PP

v.

ALOYWISIUS ANDREAS BELIA DAFID

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CTK NO: K45-02-2003]
7 AUGUST 2006

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Mitigating circumstances - Plea of guilty - Reduction principle - Public interest - Consideration of - Whether accused deserved maximum sentence under s. 304(a) Penal Code*

The accused was initially charged under s. 302 read together with s. 34 of the Penal Code for committing murder by causing the death of one Sarah Binti Ebrahim ('the deceased'). The deputy public prosecutor had received instruction to amend the charge preferred against the accused. He was then charged under s. 304(a) of the Penal Code to which he pleaded guilty. The accused, who understood the nature and consequences of the charge and had admitted to it without qualification, was therefore found guilty by this court of the offence as charged. The brief facts of the case were that on 26 October 2002, the deceased had been hit on the head with a hammer by the accused who had continued hitting her until she collapsed. The accused then wrapped the body of the deceased with a canvas mat and placed the body into the boot of the Proton Satria car. He then stopped at Pekan Inanam to have a drink before proceeding to Kampong Gayang where he had thrown the deceased's body down a slope. On 28 October 2002, the police was notified of a body found at the slope and the accused was arrested on 31 October 2002. In the plea for mitigation, the counsel for the accused advanced four arguments: (1) the guilty plea of the accused should be treated as a single most important mitigating factor; (2) the accused had been in remand for more than three years and such period should be taken into account for the purpose of passing sentence; (3) the accused was a first offender with no previous conviction and (4) the accused was remorseful and repentant for his act and had apologised to the family of the deceased. The deputy public prosecutor, on the other hand, submitted that the offence committed by the accused was grave and serious as his act had caused the loss of one's life. Further, the nature of the injuries

A inflicted upon the deceased showed the brutal nature of the killing. It was urged upon this court to impose a deterrent sentence and that public interest required the highest sentence afforded by law so as to set a precedent that an offence of this nature would severely be punished by the law.

B **Held (sentencing accused to be imprisoned for 20 years from date of arrest):**

(1) The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case. The reduction principle C should not be slavishly applied in every case where an accused person pleads guilty. This court was more inclined to think that discount may be given (if any) if and when the accused pleads guilty to the original charge and not to the reduced charge. To do so would amount to allowing the D accused to have 'two bites at a cherry'. (paras 21 & 23)

(2) The victim met a grim, grotesque and ghastly fate when she was attacked by the accused. The attack on the victim was totally unprovoked. The victim was having a drink when she E was hacked on the head until she fell down. The accused continued hitting her with the hammer until she collapsed on the floor. The graphic portrayal of the victim's head as seen in the admitted exhibits depicted that the death of the victim was nothing less than brutal. Such element of ruthless violence F could not be viewed lightly. (paras 26 & 27)

(3) The fact that the accused was a first offender and had no previous conviction could not be a powerful mitigating factor when confronted with a case of such gravity. As such the plea G that he has aged parents to look after was not a matter which in the ordinary way this court could take into consideration by way of a reduction in the sentence of imprisonment. (para 27)

(4) The accused had done the right thing to apologise to the family of the victim. However, no amount of apologies would H bring back the dead victim. The family of the victim would have to come to terms with the trauma, the shock and the loss caused by the horrifying death of the victim. Nothing could alleviate the anguish and sorrow experienced by the victim's family. (para 28) I

(5) It would appear that the accused had planned the entire episode well. His nonchalant attitude of going to Pekan Inanam and stopping there for a drink was highly disturbing as though taking someone else's life was of no consequence at all to him. The life of an individual is sacred and must be respected. No respect has been shown by the accused to the life of the victim as demonstrated from the way the victim was hacked and such disrespect was also displayed by him when the victim was already dead. (para 29)

(6) When a life has been lost in such callous fashion and no mercy has been shown by the accused to the victim while she was still living or when she was already a dead corpse in the boot of the car, public interest demands that such person like the accused be handed down with exemplary justice reflecting the abhorrence of society. (para 30)

(7) Under s. 304(a) of the Penal Code, the maximum sentence is 20 years. After taking into full consideration of the mitigation pleaded on behalf of the accused as well as the submission of the learned deputy, the maximum sentence is the sentence that the accused deserved. (para 31)

Case(s) referred to:
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Low Kok Wai [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 HC ***(refd)***
PP v. Shariffah Syed Hashim [2006] 6 CLJ 503 HC ***(refd)***
Rex v. Grondkowski [1946] 1 All ER 560 ***(refd)***
Rex v. Kenneth John Ball 35 Cr App R 164 ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39B(1)(a)
Penal Code, ss. 34, 302, 304(a)

For the accused - VK Liew; M/s VK Liew & Partners
For the prosecution - Wan Abdul Razak Wan Hussain DPP

Reported by Suhainah Wahiduddin

A

JUDGMENT

Sulong Matjeraie J:

[1] The accused was initially charged under s. 302 read together with s. 34 of the Penal Code with Mr. Ang Chuan Chooi in furtherance of a common intention for committing murder by causing the death of one Sarah binti Ebrahim, 46 years old. Mr. Ang Chuan Chooi who underwent coronary angiography had become increasingly frail with coronary disease and its complications. On 29 November 2004 the charge against Mr. Ang Chuan Chooi was withdrawn by the Public Prosecutor.

[2] On 19 July 2006, the learned Deputy Public Prosecutor Encik Wan Abdul Razak bin Wan informed this court that he had received instruction to amend the charge preferred against the accused. He was charged under s. 304(a) of the Penal Code and to which he pleaded guilty. The accused, who understood the nature and consequences of the charge and had admitted to it without qualification was therefore found guilty by this court of the offence as charged.

Brief Facts Of The Case

[3] The brief facts of the case as agreed by the accused showed that on 26 October 2002 at 11am, he and Sarah binti Ebrahim (the deceased) were in the office of Tatlee Corporation Sdn. Bhd, Lot 25, Kian Yap Industrial Estate, Lorong Durian 3, Kolombong, Kota Kinabalu, Sabah. While the deceased was drinking water she was hit on the head with a hammer by the accused. She fell down on the table and using the hammer the accused continued hitting her until she collapsed on the floor.

[4] The accused then wrapped the body of the deceased with a canvas mat that he obtained from the car boot. He then placed the body of the deceased into the boot of the Proton Satria Car bearing Registration No. SA 8476 T.

[5] The accused then wiped off the blood on the table and the floor with clothes and sponge.

[6] Some two (2) hours later at around 1.15pm the gate of the garage was opened by the accused using a remote control and he drove the car out to Pekan Inanam. He stopped at Pekan Inanam for a while to have a drink before proceeding to Kampong Gayang, Tuaran where he stopped the car and parked it by the road side.

[7] The accused then opened the car boot, took out the deceased's body. After removing the body from the canvas mat he threw the body down the slope!

[8] On the way back from Inanam, the accused stopped by the road side; placed the canvas mat inside a pail and threw it into the drain. He left for Inanam and cleaned the inside part of the car to get rid of the blood stain.

[9] The next day however, on 27 October 2002 at around 10.36am the accused went to the police station to lodge a report that the deceased was missing!

[10] On 28 October 2002 at about 7.30am Minik bin Sinti and Flortie bin Amiru found the deceased's body and notified the villagers. The police were notified and when they arrived, they saw the body of the deceased lying at the slope near the road of Kampong Gayang, Tuaran.

[11] The body of the deceased was brought to the mortuary of Queen Elizabeth Hospital where a post mortem was conducted on the same day at 3.40pm by Dr. Jessie Hiu, the Forensic Pathologist. The cause of the death was due to "Head Injuries".

[12] The accused was arrested on 31 October 2002 at the Tuaran Police Station.

[13] I have gone though carefully the plea of mitigation (encl. 39) of Mr. V.K. Liew, the learned counsel of the accused as well as his authorities. Similarly I have also examined in detail the submission (encl. 36) and the authorities (encl. 37) of the learned deputy public prosecutor, Encik Wan Abdul Razak bin Wan Hussin in this judgment. Further, I have also considered the reply made by the learned counsel for the accused to the submission of the prosecution (encl. 41).

A **Mitigation**

[14] In his mitigation, learned counsel for the accused informed this court that the accused is 28 years old from Tawau and graduated with a Diploma in Accountancy. He worked in Tatlee
B Corporation Sdn. Bhd. with a salary of RM1,200 per month. Four arguments were advanced by the learned counsel.

[15] Firstly, the guilty plea of the accused should be treated as a single most important mitigating factor for it saves the country a great expense of a lengthy trial as the prosecution have persons
C to be called as witnesses should the case go for full trial.

Secondly, the accused has been in remand for more than three years and such period should be taken into account for the purpose of passing sentence.

D

Thirdly, the accused is a first offender with no previous conviction and fourthly the conduct of the accused as he was remorseful and repentant for his act and had apologised to the family of the deceased. It was also submitted that the accused had cooperated
E with and assisted the police after his arrest by providing useful information. Therefore learned counsel urged this court to sentence him leniently so that he can look after his aged parents.

Arguments Of The Deputy Public Prosecutor

F **[16]** The learned deputy public prosecutor on the other hand submitted that the offence committed by the accused was grave and serious and urged this court to impose a maximum deterrent sentence against the accused as his act had caused the loss of one's life. Further the nature of the injuries inflicted upon the
G deceased shows the brutal nature of the killing. It was submitted by the learned deputy that the deceased's head was struck with a hammer without any provocation.

[17] The learned deputy therefore urged this court to impose
H deterrent sentence as the offence committed was one of a grave character and that public interest requires the highest sentence afforded by law so as to send a clear message and set a precedent that offence of this nature would not be tolerated and would severely be punished by the law.

I

Public Interest

[18] One of the main considerations in the assessment of sentence is of course the question of public interest. I can do no better than just quoting a passage from the judgment of Hilbery J in *Rex v. Kenneth John Ball* 35 Cr. App R 164 said as follows:

> In deciding the appropriate sentence a court should always be guided by certain principles. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interests in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore fix the sentence what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and duty to decide whether to be lenient or severe.

[19] The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v. Grondkowski* [1946] 1 All ER 560 offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interest of justice means only the interests of the prisoners.

[20] Lawton LJ in Re James Henry Sargeant at p. 77 referred to the classical principles of sentencing, namely, retribution, deterrence, prevention and rehabilitation and said that the court ought always to have these four classical principles in mind and apply them to the facts of the case to see which of them has the greatest importance in the case. On retribution Lawton LJ said:

> The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked; it is that society, through the courts, must show its

A abhorrence of particular type of crime and the only way in which the court can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of this court is to lead public opinion.

B **Guilty Plea**

[21] The learned counsel for the accused argued that the guilty plea by the accused should be treated as a single most important mitigating factor. It is generally accepted that the extent of the C reduction on account of a plea of guilty would be between one quarter and one third of what otherwise would have been the sentence, see *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case and D it cannot be a persuasive factor when effectively there is no defence at all had been provided by the accused, see *PP v. Low Kok Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268. Further the reduction principle should not be slavishly applied in every case where an accused person pleads guilty, see *Zaidon Shariff v. PP* E [1996] 4 CLJ 441.

[22] In this instant case, the accused was initially charged under s. 302 of the Penal Code. Of course when the charge under s. 302 of the Penal Code was read to him at the initial stage of F the proceeding, he pleaded not guilty. As indicated by the learned counsel for the accused in his submission that this charge was subsequently reduced to s. 304(a) of the Penal Code though plea bargaining,

G **[23]** Now the question that should be asked is this: should a discount be given to an accused who pleaded guilty to a lesser charge? Would the 'discount rule' apply to a situation where the accused who has pleaded not guilty to a more serious charge like murder and thereafter the charge is reduced to a lesser charge like culpable homicide not amounting to murder? Neither the learned H counsel for the accused nor the learned deputy addressed this court on this issue. I would however be more inclined to think that discount may be given (if any) if and when the accused pleads guilty to the original charge and not to the reduced charge. To do so would amount to allowing the accused to have "two I bites at a cherry". Further, unlike this instant case, the case

quoted extensively by learned counsel for the accused *Mohd Abdullah Ang Swee Kang Public Prosecutor (supra)* does not involve a loss of life. In any event, the discount rule is not a strict rule of practice as this court may still refuse to grant any discount in the exercise its discretion.

[24] My attention is also drawn to the case of *Tham Kai Yau & Ors v. Public Prosecutor* [1977] 1 MLJ 174 where the Federal Court set aside the convictions for murder and substituted them with one under the first part of s. 304 of the Penal Code and sentenced each of the appellant to 10 years imprisonment. Upon reading the said case it is obvious that the learned judge in the said case failed to put clearly to the jury the distinction between murder and culpable homicide not amounting to murder to enable them to come to a correct conclusion. Medical evidence suggests that culpable homicide not amounting to murder would be a reasonable charge in the said case.

[25] The other two cases quoted in the learned counsel submission are *Mohd. Abdullah Ang Swee Kang v. Public Prosecutor (supra)* which relates to a charge of criminal breach of trust and the case of *PP v. Shariffah Syed Hashim* [2006] 6 CLJ 503 involves a reduction of a charge under s. 39B(1)(a) Dangerous Drugs Act 1952 to s. 6 of the same Act. The facts of the two cases are entirely different from this instant case.

[26] In this case the victim met a grim, grotesque and ghastly fate when she was attacked by the accused. The attack on the victim was totally unprovoked. The victim was having a drink and she was hacked on the head until she fell down on the table. Not enough, the accused continued hitting her with the hammer until she collapsed on the floor. The graphic portrayal of the victim's head as seen in the admitted exhibits depicted that the death of the victim was nothing less than brutal.

[27] Such element of ruthless violence cannot be viewed lightly and are of course different from the facts of the cases quoted by the learned counsel for the accused. The fact that the accused is a first offender and has no previous conviction cannot therefore be a powerful mitigating factor when confronted with a case of such gravity. As such the plea that he has aged parents to look after is not a matter which in the ordinary way this court can take consideration by way of a reduction in the sentence of imprisonment.

[28] It is also noted that the accused had done the right thing to apologise to the family of the victim. However no amount of apologies will bring back the dead victim. The family of the victim will have to come to terms with the trauma, the shock and the loss caused by the horrifying death of the victim. Nothing can alleviate the anguish and sorrow experienced by the victim's family.

[29] Reflecting on the facts of the case, it would appear that the accused had planned this entire episode well. I will not speculate on the reason why the accused reported to the police about a missing person knowing fully well that that he has thrown the body of the victim down the slope at Kampong Gayang, Tuaran. However, his nonchalant attitude of going to Pekan Inanam and stopping there for a drink is highly disturbing as though taking someone else's life is of no consequence at all to him. The life of an individual is sacred and must be respected. No respect has been shown by the accused to the life of the victim as demonstrated from the way the victim was hacked and such disrespect was also displayed by him when the victim was already dead.

[30] After taking into consideration the mitigation and in view of what has been discussed earlier, it is my considered view that when a life has been lost in such callous fashion and no mercy has been shown by the accused to the victim while she was still living or when she was already a dead corpse in the boot of the car, public interest demands that such person like the accused be handed down with exemplary justice reflecting the abhorrence of society.

[31] Under s. 304(a) of the Penal Code, the maximum sentence is 20 years and after taking into full consideration of the mitigation pleaded on behalf of the accused as well as the submission of the learned deputy, I feel that maximum sentence is the sentence that the accused deserves. I accordingly sentence you, Mr. Aloywisius Andreas Belia Dufid to be imprisoned for a term of 20 years from the date of your arrest.

[32] The exhibits in this case are to be handed over to the police for safekeeping.